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No. 99-77

IN THE

Supreme Court of the United States

EXZAVIOUS LEE GIBSON,

Petitioner,

—v.—

TONY G. TURPIN, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

MOTION OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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OCTOBER TERM, 1999

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The NAACP Legal Defense and Educational Fund ("LDF") hereby respectfully moves for leave to file the attached brief as *amicus curiae* pursuant to Rule 37.2(b) of the Rules of this Court. Petitioner has consented to the filing of this brief. Respondent has refused consent.

INTEREST OF NAACP LEGAL DEFENSE & EDUCATIONAL FUND

LDF is a non-profit corporation formed to assist African-American citizens to secure their rights under the Constitution and laws of the United States and chartered by the Appellate Division of the New York Supreme Court as a legal aid society. *See NAACP v. Button*, 371 U.S. 411, 415 (1963) (recognizing LDF's

"corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

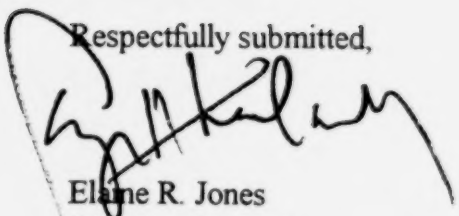
LDF has long been involved in efforts to provide counsel for indigent condemned prisoners in state and federal post-conviction proceedings. Since this Court's decisions in 1976 allowing the resumption of capital punishment, *Gregg v. Georgia*, 428 U.S. 153(1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976), lawyers employed by LDF have represented hundreds of individuals sentenced to death in state and federal post-conviction proceedings in Georgia and other states, recruited lawyers to provide *pro bono publico* representation and given advice to lawyers who have come forward to provide such representation.

Our experience in these matters has taught us, particularly in light of jurisprudential changes in habeas corpus since *Giarratano*, that it is now impossible for a condemned inmate to represent himself in a minimally adequate fashion in capital post-conviction proceedings. The states understand this point: only specialist in state attorney generals' offices represent the states' interests in these proceedings. We believe the time has come for the Court to declare that the Fourteenth Amendment's due process clause requires the provision of counsel services in these important post-conviction proceedings.

For the above-stated reasons, LDF respectfully urges the Court to grant this motion for leave to file the attached brief as *amicus curiae* in the present case in the support of the position of the Petitioner.

Dated: August 6, 1999

Respectfully submitted,



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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense and Educational Fund (LDF) has repeatedly observed the crucial role lawyers play in capital post-conviction proceedings, both in vindicating the constitutional rights of poor people sentenced to death and in ensuring the even-handed administration of justice. This has been particularly true in Georgia, where relief has been granted as to conviction or sentence for over half of the individuals who first sought and were denied direct appeal relief, and who thereafter initiated and pursued post-conviction remedies.

Amicus has observed the problem of lack of representation in post-conviction proceedings grow well beyond the crisis stage since the demise of the post-conviction defender organizations five years ago.[2] While lawyers employed by LDF continue to handle a small number of capital post-conviction cases, recruit volunteer lawyers, and assist lawyers they and the American Bar Association's Death Penalty Representation Project have recruited, there remain more death-sentenced individuals without counsel than lawyers willing to represent them.

SUMMARY OF ARGUMENT

This case presents an important issue for the administration of the death penalty: Whether the Fourteenth Amendment's promise that life not be taken without due process requires states to provide

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[1] This brief was prepared by counsel of record for *amicus*, with abundant assistance from LDF summer intern Deborah Cornwall. No party or third party made any financial contribution in support of these efforts.

[2] *See* Roscoe C. Howard, Jr., *The Defunding of the Post-Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 912-15 (1996) (describing the elimination of funding for the resource centers).

competent counsel to indigent prisoners for capital state post-conviction proceedings?

Ten years ago, this Court considered this question in *Murray v. Giarratano*, and, in a 5-4 decision, held narrowly that the Constitution did not require the states to provide counsel.[3] Justice Kennedy, a member of the majority, wrote that his vote rested in part on the fact that Virginia provided by statute for the appointment of counsel in state post-conviction proceedings and that no inmate in that state had been left to negotiate those waters without legal assistance.[4] The four dissenting Justices concluded that because of the complexity of the capital post-conviction process, the limited reading and writing skills of many condemned inmates, and the fact that certain claims raised in such proceedings require investigation and the presentation of evidence, the Constitution indeed requires the provision of counsel in such proceedings.[5]

In the decade since *Giarratano*, changes to post-conviction practice mandated by the Court, Congress, and many states including Georgia have transformed this remedy for wrongful incarceration. Today, state and federal remedies operate more swiftly than before, are governed by law considerably more complicated than a decade ago, and seldom tolerate mistakes, even those made in good faith. Prisoners must now bring their cases to the state and federal courts more promptly, include in the initial petition every possible meritorious claim, and support each with all relevant facts. Much more so than a decade ago, any failure to timely present both the claim and the supporting facts, regardless of

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[3] 492 U.S. 1, 11 (1989).

[4] *Id.* at 14.

[5] *Id.* at 19, 27.

the merit of the claim, will result in the claim not being heard in either state or federal proceedings. Due process requires the provision of counsel in this newly accelerated, more final, more rigid capital post-conviction review system.

In this case, Exzavious Gibson, an indigent, mentally impaired, African-American condemned man in Georgia, asks that the Court revisit this question. Unlike Virginia, and now every other state that utilizes the death penalty, Georgia makes no provision for the appointment of competent counsel to its indigent condemned persons for post-conviction proceedings. Consequently, Mr. Gibson was forced to represent himself at his state post-conviction hearing. The record leaves no room to doubt his patently inadequate performance in a role for which he had neither relevant training nor experience.

We urge the Court to grant review here because significant changes in the law governing post-convictions proceedings compel reconsideration of *Murray v. Giarratano*. During the past decade, federal and state habeas law has become more complex, and it has become virtually impossible for imprisoned, often illiterate and mentally impaired individuals like Gibson to master and comply with the rules governing post-conviction review. Moreover, these changes have led fewer attorneys to volunteer to represent the condemned in these proceedings. Our experience in post-conviction cases from Georgia during this time shows that (1) more often than not, harmful constitutional errors mar state trials, (2) these errors are not corrected on direct review, and (3) often the merit of these claims are demonstrated in post-conviction proceedings only after considerable investigation and record supplementation, essential tasks that cannot be accomplished from a death row cell.

ARGUMENT

I. The New Habeas Landscape is More Complex, More Accelerated and Far Less Tolerant of Mistakes, However Technical.

When this Court decided *Giarratano*, several Justices noted that capital post-conviction procedure was already complicated and well beyond the ability of most condemned inmates to navigate effectively without the aid of counsel. If the "Court's death penalty jurisprudence unquestionably [was] difficult for a trained lawyer to master,"[6] then, as Justice Kennedy's concurrence noted, its "complexity... [made] it unlikely that capital defendants [would] be able to file successful petitions for collateral relief without the assistance of persons learned in the law."[7]

Not long thereafter, the Court squarely recognized as much. In *McFarland v. Scott*, the Court held that the complexity of the *federal* habeas process could require the appointment of counsel for indigent capital prisoners even before a petition is filed.[8] McFarland had been convicted of capital murder and had repeatedly filed unsuccessful requests to stay his execution date in state court to allow time to locate volunteer counsel to represent him in post-conviction appeals.[9] The state court refused to appoint counsel, and McFarland's skeletal *pro se* motion in federal district court seeking a stay of execution and the appointment of counsel to prepare a

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[6] *Giarratano*, 492 U.S. at 27 (Stevens, J., dissenting).

[7] *Id.* at 14 (joined by O'Connor, J., concurring in the judgment); *see Murray v. Carrier*, 477 U.S. 478, 496 (1986) (federal habeas review is a "procedural maze of enormous complexity.") (Stevens, J., concurring).

[8] 512 U.S. 849, 858 (1994).

[9] *Id.* at 851-52.

habeas petition was denied.[10] Reversing the Fifth Circuit, the Court adopted the reasoning of Justice Kennedy's *Giarratano* concurrence and held that "[a]n attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial," because "[t]he complexity of our jurisprudence in this area ... makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."[11] Mindful of the exceedingly intricate habeas jurisprudence and strict default rules, six Justices acknowledged that "[r]equiring an indigent capital petitioner to proceed without counsel in order to obtain counsel . . . would expose him to the substantial risk that his habeas claims never would be heard on the merits."[12]

As the *McFarland* Court observed, since 1989 the system has grown considerably more difficult for attorneys -- much less indigent capital prisoners on their own -- to navigate effectively. As we show below, during the last decade several decisions from this Court as well as Congressional amendments to federal habeas law, have reconfigured the post-conviction remedy so that it works faster, is more complicated, is more final, and is less tolerant of litigants' uninformed mistakes and errors on even highly technical matters. Thus, while the need for counsel to ensure even-handed administration of justice was indeed strong in 1989, it is overwhelming today.

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[10] *Id.* at 852-53.

[11] *Id.* at 855-56, *citing Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring).

[12] *McFarland*, 512 U.S. at 856.

A. Several decisions since 1989 have made this process more complicated and less comprehensible for pro se *applicants.*

Since considering this issue in *Giarratano*, the Court has significantly changed the habeas remedy. On each occasion, it has replaced rules that were generally tolerant of negligent mistakes made by prisoners and their counsel with rules that foreclose relief except in very limited circumstances. The collective effect of these changes has transformed habeas from a flexible process to one governed by strict procedural rules, and thus requires the Court to make one further change: to hold that due process requires the provision of counsel services in capital post-conviction proceedings.

For example, in *Coleman v. Thompson*, a case in which volunteer counsel inadvertently filed a state habeas appeal three days late, the Court held that subsequent federal review was foreclosed because the judgment dismissing the state habeas appeal as untimely constituted adequate and independent state grounds.[13] This rule replaced a more flexible standard that presumed federal merits review remained available absent clear evidence that the prisoner had deliberately bypassed the appeal.[14] In this same vein, the Court recently announced in *O'Sullivan v. Boerckel* that a similar default rule applies to state discretionary appeals where a prisoner fails to include all claims she wishes to present in federal habeas proceedings.[15] If competent attorneys occasionally forfeit claims by failing timely to meet and satisfy state procedural rules,

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[13] 501 U.S. 722 (1991).

[14] *Fay v. Noia*, 372 U.S. 391 (1963).

[15] 67 U.S.L.W. 4389 (June 7, 1999).

indigent *pro se* prisoners are even more likely to run afoul of them.[16]

One year after *Coleman*, the Court in *McCleskey v. Zant* again replaced a more forgiving standard with a strict default rule, this time barring the consideration of claims presented for the first time in second or subsequent federal habeas petitions.[17] McCleskey claimed in his initial state habeas petition that the state's use at his trial of conversations with a jailhouse informant violated his Sixth Amendment rights under *Massiah v. United States*,[18] but did not repeat that claim in his initial federal habeas petition because he lacked evidence to prove it.[19] One month before filing his second federal habeas petition, McCleskey received previously undisclosed state documents which strongly supported his claim.[20] The District Court held extensive hearings and granted relief.[21] However, this Court held that the second petition was an "abuse of the writ" that precluded consideration on the merits.[22] In so doing, the Court rejected its prior "deliberate abandonment" standard for a more stringent test requiring petitioners to show "cause and prejudice" for

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[16] *See, e.g., Fullwood v. Sivley*, -- S.E.2d --, 1999 WL 343724 (Ga. 1999) (*pro se* prisoner's timely filing of notice of appeal from adverse state habeas rule did not timely preserve right to appeal as state law also requires timely filing of application for certificate of probable cause).

[17] 499 U.S. 467 (1991).

[18] 377 U.S. 201 (1964).

[19] 499 U.S. at 472-73.

[20] *Id.* at 474.

[21] *Id.* at 475-76.

[22] *Id.* at 497-503.

"inexcusable neglect" in failing to include the claim in initial federal habeas petitions.[23]

McCleskey's lesson for habeas petitioners, as Justice O'Connor later warned, is that "the Court's reformed waiver and abuse of the writ doctrines make it especially important that the first petition adequately set forth *all* of a state prisoner's *colorable grounds* for relief."[24] In other words, petitioners must timely and adequately plead specific federal constitutional violations in the initial *state habeas* proceedings to preserve and exhaust them for federal review.[25]

The Court has since extended the reasoning of *Coleman* and *McCleskey* to bar in federal habeas the introduction of facts that

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[23] *Id.* at 490.

[24] *McFarland*, 512 U.S. at 860 (O'Connor, J., concurring in the judgment and concurring in part) (emphasis added).

[25] *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam) (to exhaust state remedies, petitioners must "fairly presen[t]" federal claims to state courts to give states the "opportunity to pass upon and correct" violations of its prisoners' constitutional rights) (citations omitted); *Myre v. Iowa*, 53 F.3d 199, 200 (8th Cir. 1995) (finding federal claim barred in state habeas because petitioners must "refer to 'a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue' in a claim before the state courts.") (citations omitted); *Brown v. Vasquez*, 952 F.2d 1164, 1166-68 (9th Cir.), *cert. denied*, 503 U.S. 1011 (1992) (under *McCleskey*, habeas petitioners have the "substantial burden" of "assert[ing] all possible violations of [their] constitutional rights in his initial application or run the risk of losing what might be a viable claim"); *see also McDougald v. Lockhart*, 942 F.2d 508, 510 (8th Cir. 1991) ("Explicit citation to the Constitution or to a federal case is necessary for fair presentation of a constitutional claim in state court").

were not timely presented in state post-conviction proceedings.[26] In *Keeney v. Tamayo-Reyes*, the Court held that state habeas counsel's negligence did not constitute cause excusing the failure to develop critical facts supporting the claim that petitioner did not understand the *mens rea* element of his *nolo contendere* plea due to an interpreter's faulty translation.

While these decisions are intended to preserve and support the dignity of the States' judicial branches, they may substantially increase the risk of erroneous conviction and sentence, including in capital cases. *Keeney*, for example, has significantly elevated the importance of finding and presenting all relevant facts in the first state post-conviction proceedings. In the absence of the guiding hand of counsel and access to investigative resources, indigent petitioners -- like Gibson -- appearing *pro se* will lack the ability to develop critical facts and will forfeit review of potentially meritorious claims as a result.[27] Fact-intensive claims that often require extensive prefiling investigation, such as *Brady* and *Strickland* violations in particular,[28] will be impossible for *pro se* petitioners to make out.

In the same year it decided *Giarratano*, the Court held in *Teague v. Lane* that federal courts could no longer grant relief if doing so would require the court to announce or apply a new rule

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[26] *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

[27] *See, e.g., Giarratano*, 492 U.S. at 19 (Stevens, J., dissenting); *cf. McFarland*, 512 U.S. at 855 ("The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified.").

[28] *Brady v. Maryland*, 373 U.S. 83 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984).

of criminal procedure.[29] *Teague* left open the precise definition of "new rules."[30] Subsequent cases reveal that the Court has still not agreed on the criteria for identifying new rules.[31] *Teague* and its progeny present a particularly formidable challenge to indigent *pro se* petitioners, who are even more unlikely than the Court or counsel to know whether a decision rendered after the date of finality is one that can or cannot be utilized in post-conviction proceedings because it announced or did not announce a new rule.

Finally, the Court adopted a more labor-intensive harmless

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[29] 489 U.S. 298 (1989).

[30] *Id.* at 301 ("It is admittedly difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.") (citations omitted); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (applying *Teague* to capital as well as noncapital prisoners).

[31] *See e.g. O'Dell v. Netherland*, 521 U.S. 151, 156, 170 (1997) (5-4) (disagreeing over whether case in question involves a new rule); *Lambrix v. Singletary*, 520 U.S. 518, 528, 541 (1997) (5-4) (same); *Saffle v. Parks*, 494 U.S 484, 488 (1990) (5-4) ("[I]t is ... difficult ... to determine whether we announce a new rule when a decision extends the reasoning of our prior cases."); *Butler v. McKellar*, 494 U.S. 407, 418 (1990) (5-4) (Brennan, J., dissenting) ("[T]he analytical distinction between legal rules 'prevailing' at the time of conviction and 'new' legal rules is far from sharp."). *Compare id.* at 415 (stating that a rule is new if characterized by "significant difference of opinion on the part of several lower courts that had considered the question previously"), *with Graham v. Collins*, 506 U.S. 461, 467 (1993) (5-4) ("[U]nless reasonable jurists hearing petitioner's claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor, we are barred from doing so now.") (citation omitted).

error standard for habeas cases in 1993.[32] The *Brecht* standard requires scrutiny of the entire record with the goal of determining whether the error had a "substantial and injurious effect or influence in determining the jury's verdict."[33] Although the rule imposes this demanding burden on both parties, a thorough review of the record is disproportionately burdensome to indigent inmates, who often lack access to the full record, to legal materials, and legal training to identify error.[34]

B. *Congressional action has accelerated this complex process.*

Congress' passage in 1996 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") further complicated habeas law.[35] The habeas amendments contained therein set forth a statute of limitations (one year for most petitioners after exhaustion of state remedies) for habeas actions.[36] This provision has shortened the time available to investigate and prepare for post-conviction review generally,[37] and has had the effect of accelerating the state habeas

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[32] *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

[33] 507 U.S. at 622, *citing Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

[34] *See, e.g., Giarratano*, 492 U.S. at 27 (Stevens, J., dissenting).

[35] Pub. L. 104-132, 110 Stat. 1214 (1996), codified as 28 U.S.C.A. §§ 2241-55, 2261-66 (West Supp. 1998).

[36] 28 U.S.C.A. § 2244(d) (West Supp. 1998).

[37] *See, e.g., Fisher v. Johnson*, 1999 WL 284954, at *3-4 (5th Cir. 1999) (holding *pro se* petitioner's federal habeas petition time-barred and that neither the fact that he did not receive notice of AEDPA's statute of limitations until 43 days after its effective date, when a copy of the provision arrived in the prison

filing process. The tolling provisions in § 2244(d) are unclear and remain so,[38] not firmly establishing whether the statute of limitation is tolled for a stay of execution,[39] while a prefiling petition for appointment of counsel is pending,[40] while a case is between state courts,[41] or when petitions for certiorari are pending.[42] Yet any prisoner mistake during the state habeas filing process likely forfeits all later review.

Given the ambiguity of the tolling provisions and the inflexibility of the one-year statute of limitations in § 2244(d), petitioners are well advised to err on the side of filing federal habeas

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library, nor his 17 days spent in psychiatric ward, medicated, without glasses, and so rendered legally blind, and denied meaningful access to legal materials, held to constitute exception justifying equitable tolling).

[38] § 2244(d)(2) provides that "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." For divergent precedent interpreting this section and the tolling question, see generally James S. Liebman & Randy Hertz, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.1b (3d ed. 1998) ("FHCPP").

[39] *See generally* FHCPP, *supra note 38, at* § 5.1b (surveying cases on statute of limitations and tolling); *see, e.g., Calderon v. United States Dist. Court for Cent. Dist. Calif.*, 163 F.3d 530, 541 (9th Cir. 1998) (en banc) (stating that a stay of execution motion coupled with *McFarland* motion for the appointment of counsel tolls statute of limitations).

[40] *See* FHCPP at §§ 3.4a, at 150 n.14, 5.1b, at 242-43 n.90 (surveying cases on tolling of statute of limitations for *McFarland* petitions).

[41] *See id.* at § 5.1b, at 238 n.65 (surveying cases).

[42] *See id.* at 238 n.65, 245 n.102 (surveying cases).

claims sooner rather than later in order to preserve the opportunity for a hearing on the merits of their claims. However, rushing to file federal habeas petitions can carry dire consequences. First, a hastily prepared federal habeas petition that does not plead all colorable federal claims will forfeit later review under the strict successor rule in § 2244(b)(2),[43] and might well constitute some type of default that bars review in the original petition.[44] Second, § 2244(d) compels prisoners to file state habeas petitions sooner in order to stop the federal clock and properly exhaust claims for federal review under § 2254(b)(1).[45] Yet hastily filing state habeas claims

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[43] "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C.A. § 2244(b)(2) (West. Supp. 1998).

[44] The Court has granted review of this question. *Slack v. McDaniel*, No. CV-95-194-DWH (9th Cir. July 7, 1998) (order denying request for certificate of probable cause), *cert. granted*, 67 U.S.L.W. 3511 (U.S. February 22, 1999) (No. 98-6322) (Question Presented: If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within the petition that were not included within the initial § 2254 filing "second or successive" habeas applications?).

[45] "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the state." 28 U.S.C. § 2254(b) (1). Although federal habeas courts cannot entertain claims until they are exhausted in state courts, state claims need not be

comes with an even greater price, as in many cases that proceeding will be the first and last opportunity to develop facts.[46] Claims that are not properly investigated or pleaded in state habeas will be defaulted under § 2254(e)(2),[47] and leave a "barren record"[48] that will effectively foreclose federal habeas review.[49] Some constitutional claims such as ineffective assistance of counsel may only be raised for the first time on state habeas. Violations of these fundamental rights go unremedied when rushed petitions, sloppy pleading and inadequate factual development foreclose meaningful

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exhausted for federal habeas courts to dismiss a petition on the merits. 28 U.S.C.A. § 2254(b)(2) (West Supp. 1998).

[46] "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C.A. § 2254(e)(1) (West Supp. 1998). *See, e.g.*, O.C.G.A. § 9-14-49 ("[T]he judge of the superior court hearing the case shall make written findings of fact and conclusions of law ... [which] shall be recorded as part of the record of the case.").

[47] "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless (A) the claim relies on (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C.A. § 2254(e)(2) (West Supp. 1998).

[48] *Douglas v. California*, 372 U.S. 353, 356 (1963).

[49] *See Wainwright v. Sykes*, 433 U.S. 72 (1977); O.C.G.A. § 9-14-48(d).

state habeas review,[50] a reality with particularly dire consequences for indigent capital petitioners compelled to appear *pro se*.

Congress itself recognized the need to appoint counsel in federal habeas capital cases,[51] and provided that states could receive even more expedited federal review if competent counsel services are provided in state post-conviction proceedings. However, while every state that uses capital punishment other than Georgia makes some provision for counsel in state post-conviction proceedings, no state known to us has yet established legal assistance programs sufficient to trigger this special status. Moreover, as the American Bar Association points out, the complexity of the new federal habeas rules have ironically functioned to deter attorneys from taking on capital cases.

C. *Georgia, like other states, has acted to speed up its post-conviction review system.*

In the wake of these significant changes to the federal habeas

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[50] *See, e.g., Breard v. Greene*, 118 S.Ct. 1352, 1353-54 (1998) (*per curiam*) (holding that § 2254(e)(2) applies to case and bars federal hearing because petitioner "fail[ed] to raise the claim in the state courts" and never sought state court hearing to establish facts essential for prevailing on claim); *Hines v. Lensing*, 1998 WL 603397, at *1 (E.D. La. Sept. 9, 1998) (stating that § 2254(e)(2) bars federal hearing on claim of ineffective assistance in failing to investigate because petitioner could have, but did not, support request for state court hearing with "[a]ffidavits, exhibits [or] other materials . . . to make an initial showing of the circumstances he believes should have been investigated"); *Royal v. Netherland*, 4 F. Supp. 2d 540, 554 (E.D. Va. 1998) (stating that § 2254(e)(2) bars hearing on claim that trial counsel was ineffective in failing to interview prosecution witnesses, because "petitioner did not take or seek the opportunity to develop . . . the factual basis of the claim in . . . state court").

[51] 28 U.S.C.A. § 2263(a) (West Supp. 1998); *cf.* 21 U.S.C. § 848(q)(4)(B) (1996) (providing post-conviction counsel in capital cases for *federal* habeas corpus proceedings).

remedy, Georgia has taken no step whatsoever to ensure that its post-conviction remedy is more available to identify and correct serious harmful violations of the federal constitution. Indeed, in the Death Penalty Habeas Corpus Reform Act of 1995, Georgia amended its habeas statute to accelerate review. Yet it made no provision whatsoever for the provision of counsel or investigative services despite the fact that only very experienced counsel from the Attorney General's Office handle capital cases in post-conviction proceedings. These amendments provide that all pretrial habeas motions must be filed within 60 days and discovery must be completed within 120 days of filing a petition.[52] An evidentiary hearing must be held within 180 days of the petition's filing,[53] and "[f]ailure to meet these requirements will result in the absence of *any* hearing on the merits for the habeas petitioner."[54]

Construction of these amendments has been strict. Recently the Georgia Supreme Court held that notwithstanding the practical reality that the short appeal window would "force [the petitioner] to file his application for certificate of probable cause before the habeas record has even been prepared,"[55] the procedural default for failure to meet the strict 30-day timetable for appealing an adverse state habeas ruling[56] would bar further review of the claims, even

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[52] GA. CT. R.44.

[53] Id.

[54] *Gibson v. Turpin*, 513 S.E.2d 186, 197 (Ga. 1999) (Fletcher, P.J., dissenting) (emphasis added).

[55] *Id.* at *9 (Sears, J., dissenting).

[56] O.C.G.A. § 9-14-52.

for indigent *pro se* petitioners.[57] The dissent accused the majority of construing the state statute as another "trap for the unwary, a means of preventing consideration of the merits that amounted to a blanket denial of the Great Writ, in fact, to a suspension of the writ."[58]

Indigent *pro se* state habeas petitioners like Gibson, who lack basic education, much less legal training, or even adequate access to legal materials,[59] cannot reasonably be expected to be able to comply with these demanding technical requirements in order to present even meritorious claims. In this case, the Warden's attorney, a highly experienced assistant Attorney General, specifically warned Mr. Gibson that he "should be aware that this is his first [state] habeas corpus proceeding and, if he chooses to file another one anything that he doesn't raise in this one is going to probably found to be waived under Georgia law."[60] Gibson, whose IQ is 76, was unable to articulate a federal constitutional claim, but stated only, "I don't have an attorney . . . I don't waive any rights."[61]

Thus, on these several fronts, changes in post-conviction law since 1989 have made it virtually impossible for a condemned

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[57] *Fullwood v. Sivley*, -- S.E.2d --, 1999 WL 343724, at *5 (Ga. 1999).

[58] *Id.* at *6 (Benham, C.J., dissenting).

[59] *See, e.g.*, Mark D. Cunningham. and Mark P. Vigen, *Without Appointed Counsel in Capital Postconviction Proceedings: A Study of the Self-Representation Competency of Mississippi Death Row Inmates*, CRIM. JUST - BEHAV. (forthcoming 1999) (assessing death row inmates' abilities, relevant aptitudes, legal knowledge and psychological ability to represent themselves).

[60] Record at 70, *Gibson v. Turpin*, No. 95-V-648 (Super. Ct. Butts County Sept. 12, 1996).

[61] *Id.* at 94-95.

inmate, from his or her cell, fairly to plead *and* prove his entitlement to habeas relief. Moreover, while the average state post-conviction case required at least 600 hours of legal work in 1989, the time necessary today is even greater.[62] Yet Georgia provides no counsel for capital habeas petitioners.[63]

II. In Georgia It Is More Likely Than Not That Harmful Constitutional Error Mars a Capital Conviction or Sentence and Is Not Remedied on Direct Review.

The availability of counsel for capital post-conviction proceedings might be of little concern if the harmful errors that occur were usually remedied on direct appeal. In Georgia, however, the post-conviction reversal rate for capital cases, as the Southern Center for Human Rights' brief points out, is staggering.

In many of these cases, the harmful error would surely not have been detected and proven in the absence of volunteer counsel. Indeed, as Mississippi's highest court recognized recently:

> The reality [is] that indigent death row inmates are simply not able, on their own, to competently engage in this type of

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[62] *See* Brief of the American Bar Association (ABA) at 34, *Giarratano* (No. 88-411); Richard J. Wilson & Robert L. Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 336 (1989); *see also Giarratano*, 492 U.S. at 27 n.20 (Stevens, J., dissenting) (citing 1988 ABA study finding that attorneys spent an average of 992 hours and $3696 on each capital post-conviction proceeding in Virginia) (citation omitted).

[63] Wyoming, the only other state that did not provide counsel to capital habeas petitioners at the time of Gibson's habeas hearing, recently amended its laws to give all capital inmates the right to counsel in post-conviction proceedings. *See Gibson*, 513 S.E.2d at 198, n.37 (Fletcher, P.J., dissenting), as amended; Fulton County *Daily Report*, June 14, 1999, p. 20, citing SEA 41, 55th Leg., 1999 Session (Wyo.) (to be codified at Wyo. Stat. Ann. § 7-6-104(c)(ii)(1999)).

> litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of [state habeas law]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.[64]

In our post-conviction work on capital cases in Georgia since *Giarratano*, we have handled numerous cases where extremely prejudicial error marred the trial, and was either not raised or remedied on direct appeal. No court would likely ever have determined the effect of these errors on the capital convictions or sentences had it been left to the *pro se* petitioner to raise and develop these claims.[65]

For example, in *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990), five independent, harmful violations of the Constitution were determined to have deprived the petitioner of a fundamentally fair sentencing determination; Ms. Buttrum was wholly unable to identify these issues and ably present and argue them to a court of law.

In *Roberts v. Zant*, No. 3:92-CV-28-GET (N.D. Ga. 1992), the district court found that the trial court's rushing the case to trial a mere six weeks after the appointment of inexperienced counsel showed an egregious violation of due process and denied petitioner the right to effective representation. Both claims were heavily dependent upon the testimony of nearly 20 witnesses we presented

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[64] *Jackson v. State*, 1999 WL 33904, at *3 (Miss. 1999) (not yet released for publication).

[65] The *amicus curiae* brief of the Southern Center for Human Rights discusses these cases in detail.

at a state habeas corpus hearing. It would have been impossible for Mr. Roberts to have assembled any of this evidence from his death row prison cell.

In *Hill v. Turpin*, 135 F.3d 1411 (11th Cir. 1998), the court granted full habeas relief on a prosecution misconduct claim, and thus did not have to reach the merits of several other meritorious claims -- including one fact-intensive *Swain v. Alabama*, 380 U.S. 202 (1965) claim -- that were based upon extensive evidence we presented in state post-conviction proceedings.

And in *Ross v. Kemp*, 393 S.E.2d 244 (Ga. 1990), the state supreme court granted full habeas relief on an ineffective assistance of counsel claim. Mr. Ross, an African-American male with a long history of serious mental illness, was represented at trial by the former Imperial Wizard of the Georgia KKK, who conducted no pretrial investigation of any sort. During state habeas hearings, we presented numerous lay and expert witnesses whose testimony proved compelling enough for the state supreme court to grant full relief. Throughout, Mr. Ross was barely competent to proceed.

These experiences have left us with no doubt whatsoever that if the capital post-conviction process is to function at all, *both* the state and the indigent condemned must have access to competent legal services.

CONCLUSION

There is no way to know whether constitutional error deprived Mr. Gibson of a fundamentally fair trial. Surely the State of Georgia is in no position to assure the Court that this case is free of harmful error, or that we can all be sure that any such error would have been detected and remedied on direct appeal. It is time for the Court to revisit this issue, and to hold that a right to counsel exists for the pursuit of capital state post-conviction proceedings.

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